IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 163 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONR OF INCOME-TAX

Versus

PANACHAND KHEMCHAND GANDHI (HUF)

Appearance:

1. INCOME TAX REFERENCE No. 163 of 1990
MR MANISH R BHATT for Appellant
NOTICE SERVED for Respondent

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE K.M.MEHTA

Date of decision: 09/05/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI FOR COURT)

#. The Income-tax Appellate Tribunal, Ahmedabad Bench "A" has referred the following question of law for the opinion of this Court under Section 256(1) of the Income-tax Act, 1961.

"Whether, on the facts and circumstances of the case, the Tribunal was right in law in coming to the conclusion that after the death of Shri Lalbhai P.Gandhi, the deceased co-parcener's share was required to be excluded from the total income of the assessee-HUF in view of the provisions of Section 30 of the Hindu Succession Act?"

#. The matter relates to the Assessment Years 1982-83 and 1983-84. The assessee is HUF in which there were four brothers. One of the co-parceners Lalbhai passed away on 30th May,1980, leaving a will dated 16th September, 1953, on the basis of which the assessee-HUF claimed that 1/4th share of the deceased belonged to three other brothers Kantilal, Ratilal and Jindas in their individual capacity, because, the deceased had bequeathed his share in the co-parcenary property in favour of these three brothers by making the will. Since three other co-parceners were given the co-parcenary property under the will, 1/4th share of the deceased co-parcener did not devolve by rule of survivorship and, therefore, it was required to be excluded while working as regards the income of the assessee-HUF.

#. The Income-tax Officer rejected the claim of the assessee-HUF by holding that the share of the deceased devolved by survivorship upon the surviving members of the co-parcenary, and not in accordance with the provisions of the Hindu Succession Act, 1956, as claimed by the assessee-HUF. In the process, the ITO held that Section 6 of the Hindu Succession Act applied to the case notwithstanding the provisions of Section 30 thereof. The ITO was also of the view that the property which had been subjected to tax as that of an HUF, would continue to be taxed as such unless and until there was a partition of such property.

#. In the appeal before the Appellate Assistant Commissioner of Income-tax, the appellate authority accepted the contention of the assessee, holding that the provisions of Section 30 of the Hindu Succession Act applied to the present case, and, therefore, the share of the deceased in the co-parcenary devolved as per the

provisions of the Hindu Succession Act and not by survivorship. He, therefore, directed the ITO to include 1/4th share of the deceased Lalbhai from the total income of the HUF. This view was confirmed by the Tribunal in respect of both the years under consideration.

#. Section 30 of the Hindu Succession Act, which falls for our consideration reads as under:-

> "30. Testamentary Succession- Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.
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> Explanation- The interest of a male Hindu in a Mitakshara co-parcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section."

5.1 It will be noticed from the provisions of Section 30 that, even a co-parcener can make a will in respect of his interest in the co-parcenary property. But for the Explanation to Section 30, this could not have happened because of the established principle of the Mitakshara Law that no co-parcener, not even a father can dispose of by will, his undivided co-parcenery interest, even if the other co-parceners consent to the disposition, the reason being that at the moment on a death, the right of survivorship of every co-parceners entitled them to get the interest of the deceased co-parceners. The share of a co-parcener in the co-parcenary property was not a defined share, but it fluctuates by increase or decrease in the number of co-parceners at a given point of time. This rule of Hindu Law which was firmly entrenched came to be dislodged by the Explanation contained in Section 30 of the Hindu Succession Act, which in terms, laid down, inter alia, that interest of a male Hindu in the Mitakshara co-parcenery property shall "notwithstanding contained in this Act or any other law for the time being in force," be deemed to be personal property capable of being disposed of by him, within the meaning of Section-30 which empowers any Hindu to dispose of by a

will or other testamentary disposition any property which is capable of being so disposed of in accordance with the provisions of the Indian Succession Act, 1925 or any other law for the time being in force and applicable to Hindus. As held by the Supreme Court in Pavitri Devi v. DarbariSingh, reported in (1993) 4 SCC 392, Section 30 employs a non-obstante clause and excludes the operation of pre-existing or any other law applicable to coparcenary property governed by Mitakshara law and introduces a fiction in its Explanation and empowers the Hindu male or female to dispose of his or her interest by a will or any other testamentary disposition known to law which would be effective after the demise. (para-3 of the judgment).

5.2 The words "notwithstanding anything contained in this Act" occurring in the Explanation to Section 30 will also take within their sweep, the provisions of Section 6 of the Act, which lays down that when a male Hindu dies after the commencement of the Hindu Succession Act, having at the time of his death an interest in the Mitakshara co-parcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the co-parcenary and not in accordance with the Act. This rule of survivorship recognised in Section 6 is given a go-bye by providing therein that if the deceased had left surviving him a female relative specified in Class I of the Schedule or a male relative, specified in that Class, who claims, through such female relative, interest of the deceased in any Mitakshara co-parcenery property shall devolve by testamentary or intestate succession, as the case may be, under the Act and not by survivorship. In case where a Hindu wants to dispose of his property including his interest in the co-parcenary property by a will as per the provisions of Section 30, such disposition by a will, will not be controlled by the mode of inheritance provided in the Hindu Succession Act. In contrast to this, the proviso to Section 6 excludes rule of survivorship only in a situation contemplated in the proviso, i.e. of a deceased leaving a surviving female of Class I of the Schedule or a male relative claiming through such female, in which event, the share of the deceased in the co-parcenery property would devolve by intestate succession under the Act and not by survivorship, if the co-parcener has not disposed of the share by a will. Even the proviso to Section 6 contemplates both testamentary or intestate succession and a reference to testamentary succession in that proviso is obviously made because of the empowerment of a Hindu to dispose of his interest in the co-parcenery property by a will under the

provisions of Section 30 of the Act.

#. In the above view of the matter, we hold that the Tribunal was right in coming to the conclusion that after the death of Shri Lalbhai, the share of that deceased coparcener was required to be excluded from the total income of the assessee-HUF in view of the provisions of Section 30 of the Hindu Succession Act since he had disposed of his interest in the co-parcenery property by a will in favour of his three brothers who were the other co-parceners. The question referred to us is accordingly answered in the affirmative, in favour of the assessee and against the Revenue. The Reference stands disposed of accordingly with no order as to costs.

[R.K. ABICHANDANI, J.]

[K.M. MEHTA, J.]
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